UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

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VIA EMAIL AND REGULAR MAIL

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USCIB COMMENTS ON OECD INTERNATIONAL VAT/GST GUIDELINES, DRAFT CONSOLIDATED VERSION

Dear Mr. Battiau,

In February 2013, the OECD's Working Party 9 issued draft VAT/GST Guidelines (the "Draft Guidelines"). USCIB recognizes that this is a work in progress and not a consensus document and appreciates the willingness of the OECD to release the guidelines in draft form. This commitment to working with business and other interested parties will enhance the value of the final product for all concerned.

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

USCIB applauds the direction that is being taken by the Draft Guidelines– basing the guidelines on the core principles of neutrality and destination, incorporating the principles of sound tax administration, acknowledging that VAT normally flows through business, and acknowledging that administrative requirements imposed on foreign businesses should be balanced with the perceived benefits and not be disproportionate. USCIB also supports the OECD's efforts to engage with non-OECD member countries on VAT issues, including the recent Global Forum on VAT.

We believe that the VAT/TAG process has resulted in Draft Guidelines on which there is substantial agreement among the OECD Secretariat, governments and business. As a result, we have only a few comments on the Draft Guidelines. We note that only certain portions of the guidelines are open for comment, our comments relate only to those portions but refer to other sections to explain our concerns.

Determining the place of business use

Paragraph 3.5 of the Draft Guidelines (which is not open for comment) provides as follows:

> Determining the place of business use in connection with a business-to-business supply is often difficult, particularly with regard to services and intangibles. To take an example, a person in Jurisdiction X may contact a company for the development of software in Jurisdiction A, download the newly developed software to a laptop computer in Jurisdiction B and use it, for example, at a business conference in Jurisdiction C. In these circumstances, a case could be made that business use takes place in whatever jurisdiction the software is accessed and used. However, this would be impossible to administer. In most cases it would be difficult for a business to track use of services or intangibles in this way and difficult for a tax administration to know where the services or intangibles were used. Even if the usage could be tracked, it would again, be difficult to place a monetary value on it in order to determine an amount of tax due and the compliance burdens on business and tax administrations would be unreasonable. In order to overcome these difficulties, VATs employ proxies to determine where business use occurs and thus which jurisdiction has the right to tax.

Paragraph 3.5 is in the section of the document dealing with single location entities and the proxy for consumption in the case of single location entities is generally the jurisdiction in which the customer is located (the main rule). Thus, paragraph 3.5 explains the need for proxies and provides proxies with which USCIB agrees.

The section on multi-location entities raises a concern, which we believe is mainly a drafting concern, but nevertheless it is important that it be clarified.

With respect to multi-location entities, the Draft Guidelines provide that "taxing rights accrue to the jurisdiction(s) where the establishment(s) using the services or intangible is (are) located. " An analysis is required to determine which jurisdictions having taxing rights.

Paragraph 3.18 (which is open for comment) provides guidance for performing that analysis as follows:

> In such a case, the location where the customer establishment uses the service or intangible, in whole or in part, is the jurisdiction that has the taxing rights over the service or intangible. "*Use of a service or intangible*29" in this context refers to the use of a service or intangible by a business for the purpose of its business operations. It is irrelevant whether this use is immediate or continuous or is intended to take place in the future. It is also irrelevant whether this use is directly linked to an output transaction or supports the business operations in general.

USCIB is concerned that this language undercuts paragraph 3.5 and potentially requires extremely broad tracking. To consider the example set forth in paragraph 3.5 in the context of 3.18, if the multi-location entity contracts for software that is downloaded to laptops across its multiple locations, presumably the cost must be recharged in some fashion. There is nothing in 3.18 that looks solely, for example, to the number of laptops in each location to which the software is downloaded, which is probably

administrable. Rather the notion is that the use may be immediate, continuous or take place in the future. Although the paragraph is limited to jurisdictions in which the customer maintains establishments, this could still require significant tracking as employees (and their laptops) move among those establishments, without regard to any temporal limit. So it is not clear how much tracking is required by paragraph 3.18 and whether that is consistent with the principles of 3.5. We do not believe that this level of tracking is intended to be required, but it cannot be ruled out based on the current draft language.

Recharge arrangement

Box 3.2 contains a definition of recharge arrangement that is extremely difficult to follow. This could be simplified and clarified by substituting the following language for the first sentence in the box:

> Under the recharge method, the recharge arrangement functions as the business agreement for internal recharges that are treated as supplies within the scope of VAT.

Dispute Resolution

The Draft Guidelines do not contain substantive or procedural rules for dispute resolution. This issue was one of two important issues (the other being anti-abuse) that was deferred. It is critical that the OECD propose and reach consensus on a means of resolving disputes involving the application of the Draft Guidelines. The issue of dispute resolution is difficult in the context of VAT because the dispute will always involve jurisdiction to tax. Thus, unlike the case of income taxes, where a dispute may involve the amount of income subject to tax in each of two (or more jurisdictions) and thus afford a basis for compromise, disputes in the area of VAT will always involve two (or more jurisdictions) asserting inconsistent taxing rights. Unless the guidelines include a framework to establish whether the main rule or an exception should take precedence and a procedure to insure the parties reach an agreement, then disputes will not be resolved and double or multiple-taxation will result.

We would like to reiterate our appreciation of the collaborative process that has resulted in an extremely strong draft and look forward to continuing to work with the OECD on these important issues.

Sincerely,

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